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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 48

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (R. 65–70) is reported at 263 F. 2d 382.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1959. (R. 70.) The petition for certiorari, filed on April 1, 1959, was granted on May 18, 1959. (R. 71.) Jurisdiction is given by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Subsection (a) of Section 272 of the Internal Revenue Code of 1939 prohibits the assessment and

collection of federal income taxes until after the Commissioner has mailed to the taxpayer a formal notice of deficiency (commonly known as the 90-day letter). Subsection (d) of Section 272 provides that a taxpayer "shall at any time have the right * * * to waive the restrictions provided in subsection (a) of this section" on assessment and collection of the tax.

The question presented is whether a notice of waiver executed by a taxpayer during the audit of his return by the Internal Revenue Service, but before issuance of a 90-day letter, is invalid on the theory that the waiver provisions of subsection (d) do not come into play until after the 90-day letter is sent. Stated otherwise, may a taxpayer waive in advance the issuance of a 90-day letter?

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 272. PROCEDURE IN GENERAL.
>
> (a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by

this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 272.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2(a)(1) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date

the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * * * *

(26 U.S.C. 292.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.272.1. ASSESSMENT OF A DEFICIENCY.

* * * * *

(5) The taxpayer may at any time by a signed notice in writing filed with the Commissioner waive the restrictions on the assessment of the whole or any part of the deficiency. The notice must in all cases be filed with the Commissioner. The filing of such notice with the Tax Court does not constitute filing with the Commissioner within the meaning of the Internal Revenue Code. After such waiver has been acted upon by the Commissioner and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

* * * * *

STATEMENT

On August 10, 1949, during the course of an audit by Internal Revenue Agents of her federal income tax return for the year 1946, the taxpayer executed a United States Treasury Department Form 870, captioned "Waiver of restrictions on assessment and

collection of deficiency in tax" (Govt. Ex. 1; R. 14, 26). So far as here relevant, that waiver reads as follows:

> Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:
>
> * * * * *
>
> Taxable year ended December 31, 1946, income tax in the sum of $9,965.48.
>
> * * * * *

On October 14, 1949, the Commissioner assessed income taxes for the taxable year 1946 against the taxpayer in the sum of $9,965.48, plus interest of $1,498.09, or a total of $11,463.57. On January 12, 1950, the taxpayer paid $1,500 on this assessment, leaving a balance due of $9,963.57. The Commissioner did not issue a statutory notice of deficiency (90-day letter) for the tax in question.[1] (R. 18–19, 26, 27; Govt. Ex. 6.)

On March 14, 1956, the United States instituted suit in the United States District Court for the District of Arizona seeking collection of the unpaid taxes in the amount of $9,963.57, plus statutory interest.

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[1] On December 16, 1949, the Commissioner did issue a notice to taxpayer asserting deficiencies in penalties for the taxable year 1946 under Sections 291(a) and 293(a) of the Code, in the respective amounts of $2,491.37 and $498.27. (R. 26–27.)

(R. 3–5, 25.) The district court held that the filing of a Form 870 notice purporting to waive, pursuant to Section 272(d) of the Internal Revenue Code of 1939, the restrictions set forth in Section 272(a) on the assessment and collection of a deficiency in tax was "premature and invalid" where such waiver was filed "prior to the determination of an assessment by the Commissioner". (R. 32.) Accordingly, the complaint was dismissed. (R. 33.) The Court of Appeals, sitting *en banc,* affirmed. (R. 65–70.)

SUMMARY OF ARGUMENT

The court below has held that waiver by a taxpayer of the restrictions provided in Section 272(a) of the 1939 Code on the assessment and collection of a deficiency in tax is invalid if filed prior to the time the Commissioner issues a formal notice of deficiency (90-day letter). This holding is contrary to the clear terms of Section 272(d), which provides that taxpayers may execute such waivers "at any time", and cannot be justified by considerations of relevant legislative policy or administrative practice.

Section 272(a) authorizes the Commissioner to mail a notice of deficiency to a taxpayer in any case where he determines a deficiency in tax. The purpose of the notice is to inform a taxpayer of the nature and amount of the deficiency determined and to afford the taxpayer an opportunity to contest it, prior to payment, in the Tax Court. The taxpayer has ninety days after the mailing of the notice within which to petition the Tax Court for a redetermination of the deficiency, and Section 272(a) further provides that no assessment of the deficiency and no distraint or

proceeding in court for its collection shall be made, begun, or prosecuted until expiration of the period within which the taxpayer may petition the Tax Court for a redetermination, and, if a petition has been filed, until the Tax Court's decision has become final.

Section 272(d) expressly provides, however, that the taxpayer shall "at any time" have the right by a signed notice in writing filed with the Commissioner "to waive the restrictions" provided in Section 272(a) "on the assessment and collection of the whole or any part of the deficiency." The manifest purpose of Section 272(d) is to enable taxpayers, by filing such waivers, to stop the accrual of interest (imposed by Section 292(a)) on a deficiency either 30 days after the filing of the waiver or on the date the deficiency is assessed, whichever is the earlier.

The Form 870 waiver filed by the taxpayer in this case recites that it is executed pursuant to the provisions of Section 272(d), that the restrictions provided in Section 272(a) are waived, and that consent is given to the assessment and collection of a specified deficiency. This waiver is in terms absolute and unqualified, not conditional, and the Government was therefore entitled to institute suit to collect the tax owing without first issuing a formal deficiency notice under Section 272(a).

The basic restriction imposed by Section 272(a), and which Section 272(d) gives taxpayers the right to waive, is that the Commissioner cannot assess and collect a tax deficiency until expiration of the period following the mailing of a deficiency notice. It would defeat the purpose of these statutory provisions, as

well as be contrary to the plain language of the notice of waiver, if a taxpayer could, by unilateral action which may be taken "at any time", stop the accrual of interest on unpaid taxes and yet not be bound by the waiver of restrictions on the assessment and collection of the deficiency. The interest which a taxpayer thereby saves has, as its *quid pro quo,* his consent to the immediate assessment and collection of the deficiency in taxes specified in the waiver. Necessarily, under this statutory scheme the requirement of Section 272(a) that the Commissioner issue a formal 90-day deficiency notice—the statutory prerequisite to the filing of a petition for review in the Tax Court—is eliminated. There is no reason for extending to a taxpayer an opportunity to litigate a proposed deficiency, where he has already consented to its assessment and collection. To hold otherwise would deny to taxpayers the opportunity to realize the financial savings in interest which accrue from the filing of a waiver before assessment.

ARGUMENT

The waiver filed by taxpayer pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939 relieved the Commissioner of the requirement of Section 272(a) that a formal notice of deficiency be issued prior to assessing the tax and instituting suit for its recovery

The court below has held that a waiver executed by a taxpayer on the standard form (Form 870) pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939, *supra,* p. 3, is "invalid for any purpose" if filed before the Commissioner has mailed a formal notice (90-day letter) of

his final determination of a deficiency in tax. (R. 68.) The decision below, which is in conflict with the decisions in other circuits, is, we believe, contrary to the language, legislative history, and policy of the statute and appears to distort the scheme established by Congress for fair, prompt, and efficient determination of tax disputes.

1. The text and background of the statutory provisions, and the long-standing administrative practice

The Board of Tax Appeals (now the Tax Court) was created by Congress in 1924[2] to furnish to taxpayers a forum in which they could litigate the amount and validity of proposed deficiencies in certain types of federal taxes without being required to pay the amount of tax in question and then sue for its recovery.[3] To afford taxpayers the opportunity to litigate first and pay afterwards, Section 272(a) of the Internal Revenue Code of 1939, *supra*, p. 2,[4] authorizes the Commissioner to mail to a taxpayer notice of a deficiency in income tax which he has determined; and provides, for the protection of the

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[2] By Section 900 of the Revenue Act of 1924, c. 234, 43 Stat. 253. By Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which amended Section 1100 of the Internal Revenue Code of 1939, it was provided that thereafter the Board of Tax Appeals should be known as the Tax Court of the United States.

[3] *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716, 721; *Everett Knitting Works* v. *Commissioner*, 1 B.T.A. 5; *Newsom* v. *Commissioner*, 22 T.C. 225, 227, affirmed *per curiam* on other grounds, 219 F. 2d 444 (C.A. 5th); *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11, 12–13 (C.A. 2d); *Daugette* v. *Patterson*, 250 F. 2d 753, 757 (C.A. 5th).

[4] Originally Section 274(a) of the Revenue Act of 1924, *supra*.

taxpayer, that no assessment or collection of the deficiency shall be made or begun until the period within which the taxpayer may petition the Tax Court for a redetermination of the deficiency has expired, and, if a petition has been filed, until the Tax Court's decision has become final.

In 1926, when Congress first gave to the Board of Tax Appeals jurisdiction to determine overpayments in taxes[5] in addition to its jurisdiction to redetermine deficiencies, it also enacted a provision, Section 274(d) (which became Section 272(d) of the 1939 Code), which gave taxpayers the right "at any time", by a signed notice in writing, filed with the Commissioner, to waive the restrictions provided in Section 274(a) (Section 272(a) of the 1939 Code) on the assessment and collection of the whole or any part of a deficiency.[6] The manifest purpose of Section 272(d) is to stop the accrual of interest if a taxpayer waives the restrictions of Section 272(a), thus permitting the immediate assessment and collection of the deficiency.[7] In such event, Section 292(a), *supra*, p. 3, which provides for the assessment and collection of interest at the rate of 6% per annum upon the amount determined as a deficiency

[5] Section 284(e) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (Section 322(d) of the Internal Revenue Code of 1939).

[6] Such waivers are not final closing agreements; hence, additional deficiencies may be determined. *Botany Mills* v. *United States*, 278 U.S. 282; *Payson* v. *Commissioner*, 166 F. 2d 1008 (C.A. 2d). However, it may be the basis for estoppel if circumstances warrant it. *Cain* v. *United States*, 255 F. 2d 193 (C.A. 8th); *Daugette* v. *Patterson*, 250 F. 2d 753 (C.A. 5th).

[7] See *Moore* v. *Cleveland Ry. Co.*, 108 F. 2d 656, 659 (C.A. 6th), and *Payson* v. *Commissioner*, 166 F. 2d 1008, 1009–1010 (C.A. 2d).

from the date prescribed for payment of the tax to the date the deficiency is assessed, further provides that, in case of a waiver under Section 272(d), interest shall be assessed and collected to the 30th day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. Form 870, the form of waiver filed herein (R. 14–15), was expressly designed for the purpose of enabling taxpayers and the Commissioner to realize the benefits of these statutory provisions.

In the interpretation and application of these sections and the corresponding provisions of prior Revenue Acts, it has been a long-standing administrative practice of the Commissioner not to send deficiency notices if a waiver has previously been filed by the taxpayer. *Associated Mutuals* v. *Delaney,* 176 F. 2d 179, 183 (C.A. 1st); *Moore* v. *Cleveland Ry. Co.,* 108 F. 2d 656, 660 (C.A. 6th). As the First Circuit has said, the repeated reenactment of these statutes by Congress should be regarded as giving "at least tacit approval to this practice". *Associated Mutuals* v. *Delaney, supra,* p. 183. See also *Helvering* v. *Winmill,* 305 U.S. 79, 83. In any event, we think that the language and purpose of Section 272(d) are clear and that the Commissioner is relieved of the restriction of sending a formal deficiency notice in any case where a taxpayer has filed a waiver pursuant to the provisions of Section 272(d).

Section 272(d), which was first enacted as Section 274(d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, permits a taxpayer to settle his tax liability and the Government to get its money without delay where no

controversy remains between the taxpayer and the Commissioner. See *Moore* v. *Cleveland Ry Co.*, 108 F. 2d 656, 659 (C.A. 6th). Under the provisions of Section 274 (a) and (b) of the Revenue Act of 1924, (the forerunners of Section 272(a) of the 1939 Code), the Commissioner was precluded from assessing the deficiency in tax until the lapse of the period following the mailing of a deficiency notice during which a taxpayer could appeal to the Board, or, if an appeal was filed, until the Board had entered its decision determining that there was a deficiency. Furthermore, Section 274(f) of the 1924 Act (corresponding to Section 292(a) of the 1939 Code, *supra*) imposed interest at 6 percent per annum on the amount determined by the Commissioner or by the Board of Tax Appeals as a deficiency from the date on which the original tax or installments for the year involved became due to the date on which the deficiency was assessed. It is important here, however, that the 1924 Act contained no provision for the stopping of interest on a deficiency during the period that the Commissioner was precluded from making an assessment.

Congress took note of this fact in enacting the Revenue Act of 1926, *supra*, by incorporating therein Section 274(d) which expressly provided that "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency". At the same time, by Section 274(j) of the 1926 Act, Congress reenacted Section 274(f) of the 1924 Act requiring

the collection of interest on a deficiency, but added that in the case of a waiver under Section 274(d), interest should be assessed only "to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier".[8] In its report[9] pertaining to the Revenue Act of 1926, the Senate Finance Committee, which had recommended the provisions of Section 274 (d) and (j), made the following explanatory statement:

> The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the commissioner against assessing and collecting the tax, but without taking away the right of the taxpayer to take the case to the board. It is provided in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time.[10]

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[8] Section 274(j) of the 1926 Act, *supra*, was reenacted as Section 292 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and appears as Section 292(c) of the 1939 Code.

[9] S. Rep. No. 52, 69th Cong., 1st Sess., p. 27 (1939-1 Cum. Bull. (Part 2) 332, 352).

[10] It should be noted that when the bill (H.R. 1, 69th Cong., 1st Sess.) was reported to the Senate by the Senate Finance Committee, and accompanied by S. Rep. No. 52, Section 274(d) of that bill read as it does in Section 272(d) of the 1939 Code, but contained an additional sentence reading: "Such waiver

In a report made in 1938 (Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3d Sess., on Proposed Revision of the Revenue Laws, 1938), a subcommittee of the House Ways and Means Committee stated (p. 53) that "[i]n order to enable the Government to collect admitted deficiencies" in an orderly and expeditious manner "without the delay necessarily involved in the issuance of a formal notice of deficiency," and also to enable taxpayers to curtail the interest period on such deficiencies "by permitting the Government to make an earlier assessment of the tax than otherwise would be possible," the Bureau of Internal Revenue has entered into cooperative agreements with taxpayers; that it has been "a practice of long standing" in the Bureau to endeavor to secure a signed agreement of a taxpayer to additional taxes proposed by an Internal Revenue Agent as the result of a field investigation, and, also, to taxes proposed in letters from the Commissioner "mailed as preliminaries to the issuance of the formal notice of deficiency" authorized in Section 272(a) of the Revenue Act of 1936,[11] and corresponding provisions of prior Revenue Acts; and that it had further been the practice to regard such a signed agreement as a valid

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shall not bar the taxpayer from receiving a credit or refund under subdivision (e) of Section 284 if the decision of the Board which has become final determines an overpayment of tax in respect of the year to which the waiver relates." Though this latter provision was retained in the Senate version of the bill, it was stricken by the Conference Committee (H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 40 (1939-1 Cum. Bull. (Part 2) 361, 369)) and does not appear in the Revenue Act of 1926 as finally enacted.

[11] C. 690, 49 Stat. 1648.

waiver under Section 272(d) of the Revenue Act of 1936, *supra,* and corresponding provisions of prior Acts, for the purpose of computing interest on deficiencies agreed to in accordance with Section 292 of the Revenue Act of 1936, *supra,* and corresponding provisions of prior Acts.

The subcommittee then referred to two decisions of the Ninth Circuit (the same court that decided the instant case) in *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904, certiorari denied, 290 U.S. 706, and *McCarthy Co. v. Commissioner,* 80 F. 2d 618, certiorari denied, 298 U.S. 655, which had held that a valid waiver could not be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60 or 90-day letter, that there was a deficiency in tax. The subcommittee then expressed its belief (p. 54) "that the language of the statute is already sufficiently clear" to establish the validity of waivers given prior to issuance of a formal deficiency notice, but nevertheless felt compelled, in view of the denials of certiorari in those cases, to recommend an amendment "to insure the validity of waivers given before the mailing of the deficiency letter," such amendment to provide that (p. 54):

> the taxpayer shall have the right at any time after a deficiency is proposed in any manner that the Commissioner may direct, whether before or after the sending of the notice of deficiency as provided in subsection (a) of that section, to waive by a signed notice in writing, and all restrictions or conditions, however imposed, on the immediate assessment and collection of the whole or any part of the deficiency so proposed.

Having stated its recommendation, the subcommittee added (p. 54) that the proposed amendment would "furnish a clear and unquestionable statutory basis for a long-established and satisfactorily functioning departmental procedure", and be conducive to the early settlement of controverted issues without the necessity for litigation, while at the same time retaining for the taxpayer "his present privilege of paying deficiencies under appeal" and thereby terminating the running of deficiency interest.

While the proposed amendment was not adopted as part of the Revenue Act of 1938 (for reasons which are not apparent, the legislative history being barren on the matter), it was enacted as part of Section 6213(d) of the Internal Revenue Code of 1954.[12] The provisions of Section 6213(d) of the 1954 Code are identical with those of Section 272(d) of the 1939 Code except for the addition of a parenthetical phrase making clear that the taxpayer should have the right to file a waiver "at any time (whether or not a notice of deficiency has been issued)". Although the District Court in the instant case was of the opinion that the addition in 1954 of this phrase "clearly reflects" the belief of Congress that the law was otherwise prior thereto, it is to be noted that the reports of the House Ways and Means Committee[13] and of

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[12] That section reads as follows:

"(d) *Waiver of Restrictions.*—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

[13] H. Rep. No. 1337, 83d Cong., 2d Sess., p. A405 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4552).

the Senate Finance Committee [14] stated that "[t]he only material change from existing law" was made in subsection (b)(3) of that section, which contained a new provision providing that any amount paid as a tax, or in respect of a tax, might be assessed upon the receipt of such payment notwithstanding the restrictions on assessment contained in subsection (a), and a further provision that if such payment was made after the mailing of a notice of deficiency, the assessment should not deprive the Tax Court of jurisdiction over the deficiency determined without regard to such assessment. In the light of these statements and the subcommittee report on Proposed Revisions of the Revenue Laws of 1938, previously referred to, we suggest that it is a plausible inference that the 1954 amendment was merely of a clarifying and declaratory nature, and that Congress did not thereby imply that the law as it existed prior to enactment of the 1954 Code did require issuance of a deficiency notice prior to assessment and collection of taxes where a taxpayer had previously filed a waiver of statutory restrictions on the assessment and collection of a tax.

2. The construction of the statute in the lower courts.

Although the Ninth Circuit has held that a taxpayer may waive the restrictions on the assessment and collection of a specified deficiency, it has, as already indicated, held that a taxpayer may not waive the right to appeal to the Tax Court until a formal deficiency has been determined by the Commissioner and notice

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[14] S. Rep No. 1622, 83d Cong., 2d Sess., p. 573 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5222).

thereof mailed to the taxpayer. *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904, certiorari denied, 290 U.S. 706; *McCarthy Co.* v. *Commissioner,* 80 F. 2d 618, certiorari denied, 298 U.S. 655; cf. *Monge* v. *Smyth,* 229 F. 2d 361, certiorari denied, 351 U.S. 976. See also *Roos* v. *United States,* 31 F. Supp. 144 (C. Cls.), and *Moore* v. *Cleveland Ry. Co.,* 108 F. 2d 656 (C.A. 6th), where the sole question related to the effect of such waivers upon the accrual of interest, but where those courts stated, as did the Ninth Circuit, that waivers filed prior to the Commissioner's determination of a deficiency were ineffective to waive a taxpayer's right to appeal to the Board of Tax Appeals. On the other hand, the First Circuit has specifically held that such waivers "obviated the need for the Commissioner to send a formal deficiency notice and precluded appeal to the tax Court". *Associated Mutuals* v. *Delaney,* 176 F. 2d 179, 183. See also *Payson* v. *Commissioner,* 166 F. 2d 1008, 1009–1010 (C.A. 2d); 57 Harv. L. Rev. 912, 914, n. 16 (1944); 9 Mertens, *Law of Federal Income Taxation,* Sections 49.02, 49.37, 49.99, 49.100;[15] Monograph of the Attorney General's Committee on Administrative Procedure, Part 9, S. Doc. No. 10, 77th Cong., 1st Sess. (1941). In the last-cited study, it was stated (p. 11, fn. 55):

> If no notice of deficiency has been sent when the waiver is signed, its execution in effect waives the privilege of going to the Board of Tax Appeals, since the jurisdiction of the Board depends upon the sending of a deficiency

[15] Corresponding sections of 9 Mertens, Law of Federal Income Taxation (Rev. ed.), are Sections 49.81, 49.115, 49.139 and 49.140.

notice which the waiver relieves the Commissioner of doing.[16]

The courts have also upheld the validity of Form 870 waivers[17] for the purpose of stopping the accrual of interest even though filed prior to the mailing of a formal deficiency notice. *Roos* v. *United States, supra; Moore* v. *Cleveland Ry. Co., supra.* See also *United States* v. *Goldstein,* 189 F. 2d 752 (C.A. 1st), holding that an "offer" (Treasury Department Form 870–TS) of waiver of the restrictions imposed by Section 272(a) did not stop the accrual of interest. In that case the court pointed out, however, that the taxpayer could have accomplished this purpose by filing a waiver on Form 870 which permitted the Commissioner to immediately assess and collect the deficiency.

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[16] This is in accord with the statement made by the Ninth Circuit in *Monge* v. *Smyth, supra,* p. 368 (but which that court in the instant case characterized as "dictum", R. 69):

"Section 272(d) provides that the taxpayer may waive the restrictions on the 'assessment and collection * * * of the deficiency' provided in Section 272(a). The first of these restrictions to be met before the Commissioner may make assessment and restraint is the mailing to the taxpayer of a notice of the determination of a deficiency. A waiver to a proposed deficiency 'allows the Commissioner to assess and collect the tax without sending the taxpayer a deficiency letter which can be used as a basis for a petition in the Tax Court.' The waiver obviated the need of sending the formal deficiency notice and precluded appeal to the Tax Court."

And see and cf. 1949 C.C.H., Vol. 3, par. 1354.847.

[17] The waivers involved in *Mutual Lumber Co.* v. *Poe, supra, McCarthy Co.* v. *Commissioner, supra.* and *Roos* v. *United States, supra,* were Form 870 waivers entitled "Waiver of Right to File a Petition with the United States Board of Tax Appeals". In 1931 that form was changed to read as in the

In the *Roos* case, *supra,* the Court of Claims remarked (pp. 150–151):

> As above stated, the waiver by plaintiff of the restrictions mentioned in section 274(a) on assessment and collection of the amount specified in the waiver was effective and was independent of the waiver of her right to appeal to the Board of Tax Appeals as to such amount. When the Commissioner, in his final determination, subsequently determined that there was a deficiency in excess of the amount mentioned in the waiver, the taxpayer had the right to take the case to the Board of Tax Appeals or to pay the tax and bring suit to recover in whole or in part.

And in the *Cleveland Ry. Co.* case, *supra,* the Sixth Circuit, after stating the purpose of Section 272(d), commented (pp. 659–660):

> In such cases the section offers a substantial inducement to the taxpayer to execute the waiver. If a waiver is of no avail until after final determination, there is little or no inducement to waive. It may be that in cases a small amount of interest might be saved if the Commissioner delayed more than 30 days in making the assessment, but this is of little consequence, since after final determination there is no oc-

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instant case (R. 14) and in *Payson* v. *Commissioner*, *supra*, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax". The Form 874 waivers involved in *Moore* v. *Cleveland Ry. Co.*, *supra*, and *Associated Mutuals* v. *Delaney*, *supra*, captioned "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" are in material respects the same as the Form 870 involved in the instant case.

casion for delay. The final audit having been made, assessment and notice are but routine ministerial acts requiring no time for study or deliberation.

In the instant case the Government brought suit to collect a deficiency in income tax, relying upon a waiver of the restrictions on the assessment and collection of a specified deficiency. Referring to its former decisions in *Mutual Lumber Co.* v. *Poe, supra,* and *McCarthy Co.* v. *Commissioner, supra,* the court below held (R. 68) that if, as decided in those cases, such a waiver was invalid because it was a premature waiver of right to go to the Tax Court, which a taxpayer does not have until a formal notice of deficiency is mailed, it was invalid for any purpose, and did not relieve the Commissioner from the statutory requirement of mailing a notice of deficiency prior to commencing this suit.

The unqualified terms of Section 272(d) provide, however, the right to waive the restrictions of Section 272(a), without limitation. And Section 272(a) restricts the assessment and collection of a deficiency prior to the mailing of a notice of the deficiency which the Commissioner is authorized to send to a taxpayer. The taxpayer's right to insist upon this restriction is clearly a right which may be waived, and has, in fact, been waived here. It is a right which a taxpayer has from the beginning and is independent of his right to go to the Tax Court if the Commissioner issues a deficiency notice for a larger amount than that specified in the waiver. As previously stated, the waiver here is, from the taxpay-

er's viewpoint, desirable because it effectively stops the accrual of interest. It is a right which a taxpayer has which does not require any agreement or consent on the part of the Commissioner. Surely there should not be imputed to Congress the intention to permit a taxpayer by unilateral action, which he can take "at any time", to stop the accrual of interest and yet not be bound by the waiver of restrictions upon the assessment and collection of the deficiency. The essential restriction imposed by Section 272(a) is that the Commissioner cannot assess and collect until the expiration of the period provided following the mailing of a deficiency notice. It is not reasonable to attribute to Congress an unexpressed purpose limiting the scope of Section 272(d). As the First Circuit pointed out in *Associated Mutuals* v. *Delaney, supra,* p. 183, if such had been the legislative purpose, it is reasonable to suppose that Congress would have specifically imposed upon the Commissioner the duty to send a deficiency letter, as it was careful to do in the analogous situation of a jeopardy assessment under Section 273 (a) and (b) of the 1939 Code.

The *Mutual Lumber Co.* and *McCarthy* cases involved situations different from that here. In those cases the question was whether the filing of a Form 870 waiver prevented the Commissioner from mailing a formal notice of deficiency and thus extending the period of limitation within which a deficiency in tax could be assessed and collected. It is to be noted that in both cases the waiver was captioned "Waiver of Right to File a Petition with the United States Board of Tax Appeals" and that by the language contained

therein the respective taxpayers expressly waived the right to file a petition with the Board and consented to the assessment and collection of deficiencies as set forth in reports of internal revenue agents.[18] In each case, the Ninth Circuit held that the provisional report of an internal revenue agent could not be made the basis of an appeal to the Board and that, in the absence of a determination of deficiency by the Commissioner, there was no right of appeal for a taxpayer to waive.[19] For this reason, the Ninth Circuit held that the "purported" waiver filed with the Commissioner before he had found any deficiency was "premature", and "powerless to prevent the Commissioner's resort to a letter of deficiency, by which the running of the statute was suspended." *Mutual Lumber Co.* v. *Poe, supra,* p. 907; *McCarthy Co.* v. *Commissioner, supra,* p. 621. It does not follow that, as held in the instant case (R. 68), the waiver was "invalid for any purpose" and that it did not relieve the Commissioner of the statutory re-

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[18] As appears from the opinion of the Ninth Circuit in the first appeal in *Mutual Lumber Co.* v. *Poe*, 44 F. 2d 922, 923, a note at the bottom of the waiver recited that it did not extend the statute of limitations for refund or assessment of tax; that it was not a final closing agreement; but that its execution and filing at the address shown in an accompanying letter "will expedite the adjustment of your income tax liability as indicated above." Apparently the Commissioner was reluctant to rely upon that waiver as authority to assess and collect the deficiency within the period agreed upon, without the issuance of a formal notice of deficiency, because of doubt as to the regularity of its filing. (44 F. 2d, pp. 923–924.) And see also the opinion of the District Court in that case upon the second trial (57 F. 2d 305, 307–309).

[19] Cf. *Moore* v. *Cleveland Ry. Co.*, *supra*, p. 659.

quirement of mailing a deficiency notice prior to commencing this suit. If waivers so filed are invalid for any purpose, they would be ineffective to stop the accrual of interest, contrary to the holdings of the Court of Claims and the Sixth Circuit in *Roos* v. *United States, supra,* and *Moore* v. *Cleveland Ry. Co., supra.*[20] On the other hand, if valid for such purpose, it is only logical to conclude that the benefit to the taxpayer in this respect is conditioned upon his waiver of the restriction upon the assessment and collection of the deficiency, and that it dispenses with the requirement that the Commissioner issue a formal deficiency notice and precludes appeal to the Tax Court unless the Commissioner should increase the deficiency over and above the deficiency to which the waiver of the taxpayer was directed, as was the situation in the *Roos, Cleveland Ry. Co.* and *Payson* cases, *supra.*

We believe that the reasoning of the First Circuit in *Associated Mutuals* v. *Delaney, supra,* is persuasive and should be accepted here. There, the First Circuit held (176 F. 2d, p. 183) that a waiver, filed pursuant to Section 272(d), to the deficiency proposed by an internal revenue agent obviated the need for the Commissioner to send a formal deficiency notice and

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[20] It may be noted that the taxpayer herein filed no return for the year 1946 (R. 37), and hence there was no time limit on the assessment and collection of the tax (Section 276(a), Internal Revenue Code of 1939). If the waiver herein is invalid for "any purpose", it would not stop the running of interest 30 days after its filing, and hence interest is still running and collectible to the day of payment.

precluded appeal to the Tax Court.[21] The taxpayer there, having been served with notice and demand for payment of income and excess profits taxes, sought an injunction against the prosecution of any proceeding for the collection of taxes. Having audited the taxpayer's returns for certain years, the agent informed the taxpayer that he would report a deficiency for the year 1941, and would recommend that overpayments for other years be credited against this deficiency. At the agent's suggestion, the taxpayer executed a Treasury Department Form 874 which in material part is the same as the Form 870 executed by the taxpayer herein. Thereafter, notice and demand for the 1941 deficiency listed in the waiver was sent to the taxpayer without any formal notice of the determination of a deficiency having previously been mailed to it under section 272(a). The taxpayer contended that the waiver of the restrictions on the assessment and collection of the proposed deficiency was ineffective because it was filed before a formal notice of deficiency under Section 272(a) was sent. While the court found no help in the legislative history of Section 272(d) (see pp. 10–17, *supra*) it reasoned (1) that the contention of the taxpayer, that the waiver of the restrictions on the assessment and collection of the proposed deficiency was ineffective because it was filed before a formal notice of deficiency under Section 272(a) was sent, was refuted by the language of Sec-

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[21] Indeed, the Court of Claims holds that a waiver of the right to appeal to the Tax Court may be filed entirely apart from the provisions of Section 272(d). *Roos* v. *United States*, *supra*, p. 150.

tion 272(d) which gives a taxpayer the right to submit a waiver "at any time" (p. 182); (2) that the wording of the waiver in Form 874 was absolute, not conditional (p. 181); (3) that under the plain language of Section 272(d), and by reference back to Section 272(a), the first of the restrictions which the taxpayer was given the right to waive was the mailing to it of a notice of deficiency (p. 182); and (4) that, in the face of repeated reenactments of the statute, the "long-standing administrative practice" not to send deficiency notices if a waiver had already been filed by the taxpayer was persuasive of legislative approval of that practice (p. 183).[22]

It may be noted that the Ninth Circuit reached a similar conclusion in its relatively recent decision in *Monge* v. *Smyth*, 229 F. 2d 361, certiorari denied, 351 U.S. 976, but refused to recognize it as controlling its decision in the instant case. There, a taxpayer sought to enjoin the collection of taxes on the ground, *inter alia*, that the Form 870–TS waiver which it had executed was invalid without determination of a deficiency and issuance of a statutory notice as provided in Section 272(a). In answer, the Ninth Circuit pointed out (p. 367) that the exception contained in Section 272(a) to the prohibition of Section 3653(a), enjoining the assessment and collection of taxes, applied only when the notice of deficiency has not been mailed.

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[22] See also *Diamond Alkali Co.* v. *Driscoll* (W.D. Pa.), decided June 13, 1940 (1940 C.C.H., par. 9526), and *Randall* v. *Riddell* (S.D. Cal.), decided February 7, 1952 (1952 C.C.H., par. 9207).

It added (p. 367) "But the notice may be waived", citing Section 272(d) as authority, and further stated that it follows that if a taxpayer signs such waiver he may not enjoin the Collector from proceeding in accordance with the waiver agreement, to collect the agreed tax. Referring to the fact that Section 272(d) affords to the taxpayer the right to submit a waiver "at any time", and that the benefit to it is the stopping of interest 30 days after filing, the Ninth Circuit stated (p. 368) that a waiver to a proposed deficiency allows the Commissioner to assess and collect the tax without sending the taxpayer a deficiency letter which can be used as a basis for a petition to the Tax Court. Accordingly, the court concluded that the execution and acceptance of the waiver (Form 870–TS) precluded the necessity of making a formal deficiency determination or a formal jeopardy assessment.

Although it is true, as the Ninth Circuit explained in the instant case (R. 69) and as shown by the last paragraph of its opinion in the *Monge* case (229 F. 2d, at 368), that a deficiency notice had been sent to the taxpayer therein; that the distraint proceedings sought to be enjoined had not been commenced until more than ninety days thereafter; and consequently that the exception to Section 3653, on which the taxpayer there relied, had no application—with the result that dismissal of that taxpayer's suit for lack of jurisdiction was properly affirmed for that reason—the views of the Ninth Circuit in the *Monge* case concerning the validity of a waiver appear equally applicable to the facts of the instant case, even though

those views constituted "dictum" (R. 69). Speaking of the *Monge* case, the court below said (R. 69) that if the waiver form (870–TS) signed in that case was the legal equivalent of the form filed in the *Mutual Lumber Co.* and *McCarthy* cases (and the instant case), the *Monge* case "unquestionably announces a rule contrary to that stated in the earlier decisions." The only material differences between the two forms are that a Form 870–TS requires acceptance by the Commissioner before it becomes operative, and once accepted prevents the Commissioner from claiming any further deficiencies for the tax years involved in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations.[23] Those differences appear to be of no significance here.

The only purpose of a deficiency notice is to apprise a taxpayer of the nature and amount of a tax deficiency determined by the Commissioner in order to afford the taxpayer an opportunity to contest it, prior to payment, before the Tax Court.[24] But if a taxpayer has already been informed of the nature and amount of the deficiency by an internal revenue

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[23] See *Monge* v. *Smyth*, *supra*, pp. 367–368; *United States* v. *Goldstein*, 189 F. 2d 752 (C.A. 1st); 9 Mertens, Law of Federal Income Taxation (1956 Cum. Supp.), Section 49.99, pp. 79–80, fn. 53.

[24] *Commissioner* v. *Forest Glen Creamery Co.*, 98 F. 2d 968, 971 (C.A. 7th); *Commissioner* v. *Stewart*, 186 F. 2d 239, 241 (C.A. 6th); *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2d); *United States* v. *Curd*, 257 F. 2d 347, 350 (C.A. 5th), certiorari denied, 358 U.S. 920; *General Outdoor Advertising Co.* v. *United States*, 169 F. Supp. 947, 950 (C. Cls.).

agent,[25] and files a waiver pursuant to the provisions of Section 272(d), the effect of which is to stop the accrual of interest on the 30th day after filing or on the date the deficiency is assessed, whichever is the earlier, it seems clear that taxpayer has thereby consented to the immediate assessment and collection of the deficiency and has waived the restriction of Section 272(a) requiring the Commissioner to first mail a formal notice of deficiency.

We submit, therefore, that the First Circuit was correct in its holding in *Associated Mutuals* v. *Delaney, supra,* and that the court below erred in failing to hold that there is no necessity for issuing a formal 90-day deficiency notice where, as in this case, the taxpayer has filed a waiver consenting to the immediate assessment and collection of the deficiency.

CONCLUSIONS

For the reasons stated, the judgment should be reversed.

Respectfully submitted.

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AUGUST 1959.

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[25] As is evidenced by the waiver filed on August 18, 1949 (R. 14), prior to the assessment of the tax, the taxpayer herein had notice of the proposed deficiency for the taxable year 1946 in the amount of $9,965.48, and had no objection thereto (R. 39).

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